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IN THE

Supreme Court of the United States

October Term, 1953

No. 491

MYRA PAGE WIREN, *Petitioner*,

v.

PARAMOUNT PICTURES, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM E. LEAHY
WM. J. HUGHES, JR.
Bowen Bldg.
Washington, D. C.
Attorneys for Respondent

LOUIS PHILLIPS
Paramount Bldg.
New York City
Of Counsel

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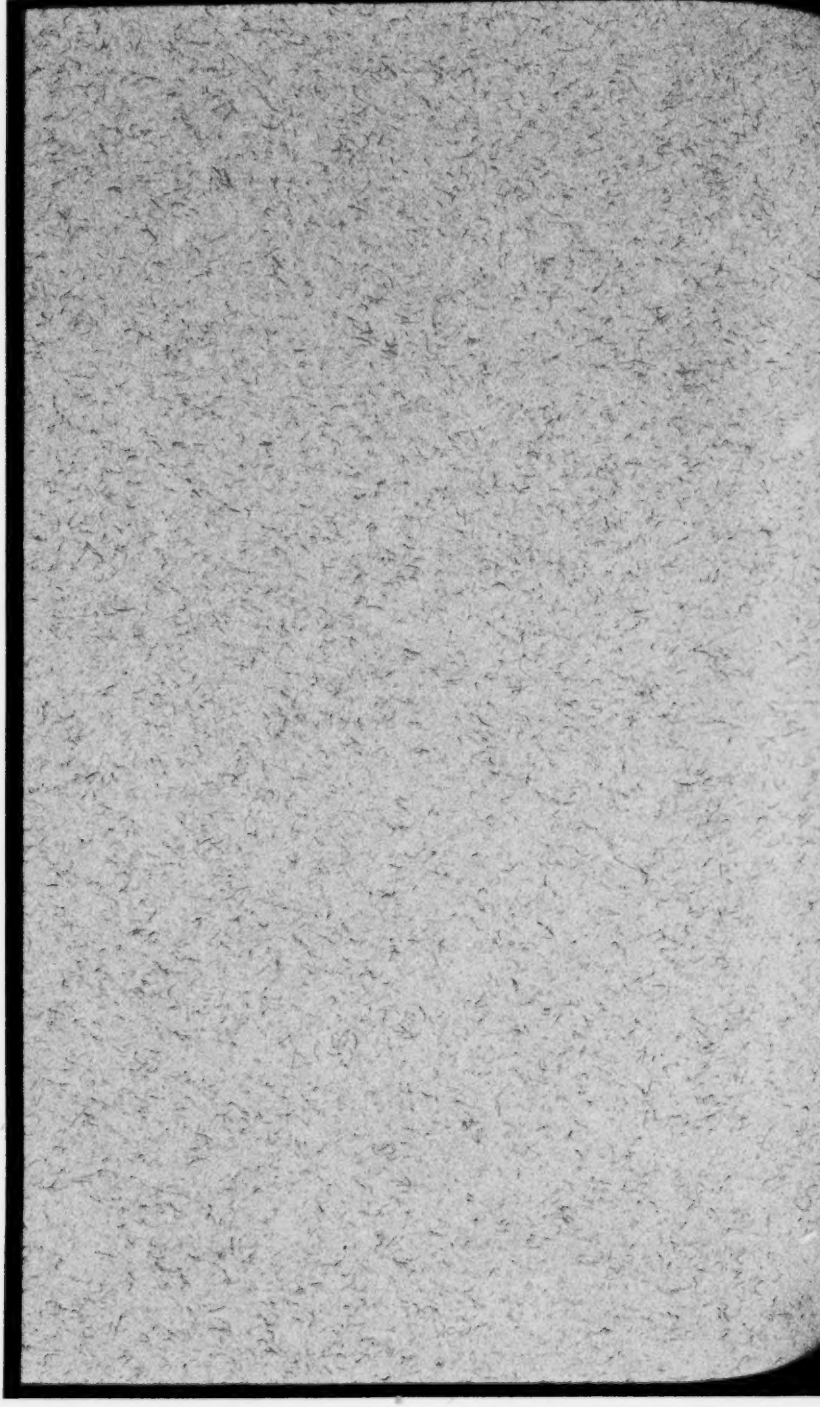

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Myra Page Wiren, *Petitioner*,

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Paramount Pictures, Inc., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent concedes this Court has jurisdiction under 28 *U.S.C.* Sec. 1254(1) and that the petition is timely.

QUESTIONS PRESENTED

1. Whether the present suit is barred by the three-year Statute of Limitations in force in the District of Columbia.
2. Whether it is barred by the doctrine of *res judicata*.

STATUTE INVOLVED

District of Columbia Code (1951) 12:201:

> "No action shall be brought for the recovery * * * of damages for any injury to real or personal property * * * after three years from the time when the right to maintain any such action shall have accrued * * *; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued * * *"

COUNTER-STATEMENT OF THE CASE

This case has been in the courts since April 3, 1931 when plaintiff filed a suit for copyright infringement of her play "Most" by the production of "Death Takes a Holiday" (App. 4A, 7A). The District Court for the Southern District of New York held there was no infringement and dismissed the suit (*Wiren* v. *Shubert Corp. et al*, 5 F. Supp. 358). The dismissal was affirmed *per curiam* (Manton, Swan and Chase, JJ) 70 F.(2) 1023, and certiorari was denied, 293 U.S. 591, rehearing denied, 293 U.S. 631.

Petitioner's Charges of Fraud:

On June 20, 1939 Circuit Judge Manton was convicted of corruption. In the meantime, in 1937 (Op. below App. 53; App. 13A) plaintiff discovered, or fancied she had discovered, a fantastic bribe of Judge Manton; namely, that Albert D. Lasker, a stockholder in Paramount, in May 1932 had bribed Manton through Lord & Thomas, Lasker's advertising firm, with a bribe of $250,000:

> "to procure a decision in favor of defendant Paramount Corporation in any appeal which was certain to be made from any ruling of the District Court on plaintiffs' bill of complaint." (App. 13A)

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The important point about the alleged bribe is the date, May 1932 (App. 13A). Appellant's infringement suit had not yet been tried, in fact it was not tried until August 24, 1933, over a year later, when the District Court dismissed it on the ground there was no infringement. (See *Wiren* v. *Shubert Co.*, 5 F. Supp. 358). Hence appellant's theory is that Lasker was so terrified of the infringement suit that he paid Manton $250,000 to "fix" the *appeal* in a suit which was not even *tried* in the District Court until 1 year and 3 months later. To appreciate the utter absurdity of such a charge the Court need only read the opinion in the infringement suit, *Wiren* v. *Shubert Co.*, 5 F. Supp. 358, where appellant's play "Most" is laid side by side with "Death Takes a Holiday." The latter no more resembles "Most" than it does Hamlet, or Faust. The complete dissimilarity between "Most" and "Death Takes a Holiday" is so apparent as to suggest the frivolousness of any appeal at all, which is indicated by the *per curiam* affirmance at 70 F. (2) 1023.

Having created the imaginary bribe, appellant's next task was to get it before the Court. This she accomplished by waiting almost five years until April 28, 1942, when she filed a motion for rehearing in the Circuit Court of Appeals (App. 13A). It was denied May 13, 1942 by Judges Swan, Clark and Frank in a memorandum opinion stating:

> "Motion denied. The delay in making this motion is not adequately explained. But assuming that this defect could be cured by a further affidavit, the alleged disqualification of Judge Manton to hear this appeal is not established. On motions such as this we have several times ruled that the disqualification must be directly connected with the very case on appeal. Mr. Lasker, to whom Judge Manton is said to have been indebted, was not a director of Paramount when this appeal was heard and he owned but 33 shares out of 3,000,000 shares of Paramount's stock. Moreover, Paramount was in the hands of

reorganization trustees at the time of the appeal. Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton. None of the other charges of disqualification has been substantiated. We are satisfied that the appeal was heard by a qualified court and was correctly decided." (Tr. 609; cf. App. 43A)

Appellant then proceeded to wait three (3) more years until June 12, 1945, when she filed a new petition for rehearing in the same C.C.A. (App. 14A). The petition was based on allegedly newly discovered evidence to the effect that the C.C.A. was wrong in holding, above, that Lasker's interest in Paramount was too remote. Instead she said it was controlling and also alleged she had further proof of the Manton bribe (App. 14A). The Court (Swan, Chase and Clark, JJ) on November 14, 1945, denied the new motion in the following words:

> "Ordered that said motion be and it hereby is denied. Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling." (App. 43A).

Appellant then waited almost three more years and filed the present suit September 28, 1948. (App. 52)

Chronology of the Case:

The chronology of the case for the last 20 years is as follows:

December 26, 1929.....	Death Takes a Holiday produced, Barrymore Theatre, New York City. (*Wiren* v. *Shubert,* 5 F. Supp. 358, 359)
April 3, 1931.....	Plaintiff files suit against Shubert, Paramount, et al., for infringement. U.S.D.Ct., S.Dist.N.Y. (App. 7A)
August 24, 1933.....	Goddard, J. dismisses suit; opinion holding no infringement 5 F. Supp. 358.

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May 21, 1934	Affirmance *per curiam* by C.C.A. 70 F. (2) 1023.
October 8, 1934	Certiorari denied, U.S. Supreme Court, 293 U.S. 591.
November 5, 1934	Rehearing denied, U.S. Supreme Court, 293 U.S. 631.
June 20, 1939	Circuit Court of Appeals Judge Manton convicted.
December 4, 1939	Manton's conviction affirmed 107 F. (2) 834.
April 28, 1942	Plaintiff moves for rehearing in C.C.A. on ground of alleged bribe to Manton. (App. 13A).
May 13, 1942	Above motion denied in memorandum opinion per Swan, Clark and Frank, JJ. (App. 13A, 43A).
October 12, 1942	Certiorari denied, U.S. Supreme Court, 317 U.S. 659.
June 12, 1945	New petition for rehearing filed in C.C.A. on ground of newly discovered evidence. (App. 14A).
November 14, 1945	Petition for rehearing denied per memorandum opinion of Swan, Chase and Clark. (App. 14A).
September 28, 1948	Present suit filed.
July 28, 1950	Paragraph 50 of Complaint amended. (App. 17A)

Holdings Below:

The District Court (Ch. J. Laws) held below that the denial of relief by the Circuit Court of Appeals for the Second Circuit on May 13, 1942 and June 12, 1945 (App. 13A-14A) constituted *res judicata* (App. 43A-46A). It also held the suit was, "as claimed by plaintiff," an action at law for damages based on fraud and was barred by the three-year Statute of Limitations in force in the District of Columbia (D.C. Code (1951) Title 12, Sec. 201; App. 46A). The Court below rested its opinion on the Statute of Limitations alone (App. 53-56). As to the original complaint based on happenings in 1932, discov-

ered in 1937, it held these events were long since barred (App. 53-54). As to the amendment to paragraph 50 of the complaint, filed July 28, 1950, alleging the original fraud was continued by Paramount in resisting plaintiff's motions of April 28, 1942 (App. 13A) and June 12, 1945 (App. 14A) in the C.C.A. by "wrongfully presenting incomplete evidence" (App. 17A), the Court below held this stated a new cause of action and did not under Rule 15(c) FRCP relate back to the present complaint filed September 28, 1948 (App. 54-56). The Court below said:

> ". . . And even though it be assumed that such subsequent conduct was motivated by, and in that sense grew out of, the fraud alleged in the original pleading, nevertheless the claim of fraud asserted in the amendment was independent and distinct, consisting of presenting to and withholding evidence from the court in 1942 and 1945. This was a new claim, not the original claim or cause of action based upon the bribe. (App. 56).

As to this part of the alleged fraud, the Trial Court (C[illegible] J. Laws) held that this was obviously intrinsic fraud for which no relief could be given in present suit. (App. 44A).

ARGUMENT

Preliminary:

Before discussing the question raised by the petition for certiorari, namely the Statute of Limitations, res judicata, construction of Rule 15 (c) of the FRCP, etc., there is a preliminary matter which, we think, is dispositive of the whole matter on the merits.

The petitioner's motion for a rehearing filed in the Court of Appeals for the Second Circuit on April 28, 1942, (App. 13A) sought a rehearing of the original appeal from Judge Goddard's judgment dismissing the complaint, which adjudicated that there was no plagiarism.

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The ground upon which Petitioner sought a rehearing in the Court of Appeals for the Second Circuit was that Judge Manton was disqualified from sitting on that Court which affirmed Judge Goddard's judgment dismissing the complaint. The Court of Appeals, which had that motion before it did not include Judge Manton. In its memorandum decision denying petitioner's application for rehearing (Swan, Clark & Frank J. J.) it held not only that Judge Manton was not disqualified from sitting on the appeal, but it went further and held that the appeal from Judge Goddard's judgment was *"correctly decided"* (App. 43A) In other words, the petitioner had no cause of action for plagiarism in the first place. This Court denied certiorari (317 U. S. 659)

In view of the foregoing, there is really nothing further for this Court to consider on the present petition. Petitioner has had her day in the District Court of the Southern District of New York and has had a proper review of the judgment rendered in that Court by a Court of Appeals competent and qualified to hear and decide the appeal.

A. The Present Suit Is One at Law, for Damages for Fraud:

If the present suit is one at law for damages, as both courts below held (App. 46A, 52-53), then admittedly we never reach petitioner's claim that there is a so-called Federal rule of laches which overrides the three-year Statute of Limitations of the District of Columbia (D.C. Code (1951) Title 12, Sec. 201). Plaintiff's own statements put the matter beyond dispute.

On page 2 of her Brief below petitioner stated: "This is an action for damages * * *." In paragraph A of her Supplemental affidavit filed August 3, 1950, she stated: "This is a new and independent action for damages to the plaintiff caused by fraud and corruption * * *."

(Tr. 497)[1] In her Petition for Writ of Mandamus filed below, she stated the action was one "for damages for fraud" (Pet. C.A. (D.C.) No. 283 Misc. p. 1). She continued:

> "The Complaint filed stated a new and original independent action for damages. * * * All other matters alleged in the Complaint in this action, including the copyright infringement, are purely secondary and incidental matters." (Pet. Below, No. 283 Misc. 1951, p. 2).

This statement is reflected in appellant's Brief below wherein she stated, p. 4:

> "the plaintiff commenced this action seeking *inter alia* damages * * * and an injunction restraining the defendant from using the judgment of the New York Court as a defense to this action."

The injunction is therefore asked to prevent the New York judgment being used as a defense in the present suit, (See appellant's brief below, Point II, p. 6; also p. 17) and hence is not an application for general injunctive relief.[2] Appellant in her Brief below, p. 16, repudiates the statement of the Court below that the case has a "dual aspect", in part a suit for injunctive relief and in part to obtain a money judgment. She continues:

> "But the basis of this action is not the infringement of the plaintiff's copyright. It is rather the fraud of the defendants. This is not the action for plagiarism which was brought in New York. This is a new and independent action for fraud * * *." (Appellant's Brief below, p. 16).

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[1] The record reference is to the pages of the unprinted record lodged in the Court of Appeals.

[2] The Court below took this view, stating:
"It is true that the complaint in this jurisdiction requests some relief equitable in nature but this must be construed as dependent upon the maintenance of the action for fraud." (App. 53, footnote 1).

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Paramount is therefore entitled to take the present suit as one for damages for fraud. It was so regarded by the Trial Court which, after eliminating any right to injunctive relief came, finally, to consider "the claim of damages resulting from fraud." (App. 43A, 46A).

The Trial Court also stated:

> "* * * since plaintiff's suit for fraud appears, as claimed by plaintiff, to be an action for damages based on fraud, it is barred by the Statute of Limitations." (App. 46A).

This was approved by the Court below (App. 53, 56).

B. An Action for Fraud Is Barred by the Three-Year Statute of Limitations:

Both Courts below held the action was for fraud and barred by the three-year Statute of Limitations of the District of Columbia (D.C. Code (1951) Title 12, Sec. 201). (App. 46A, 56). That statute applies to actions for fraud (*Johnson* v. *Taylor*, 73 F. Supp. 537; *District-Florida Corp.* v. *Penny*, 62 App. D.C. 268; 66 F. (2) 794). Even if the suit is indiscriminately at law and in equity, the three-year statute applies (*Anglo-Colombian Co.* v. *Stapleton*, 57 App. D.C. 209; 19 F. (2) 683; *Hurdle* v. *American Security & Trust Co.*, 59 App. D.C. 58; 32 F. (2) 954, 956).

As petitioner discovered the original fraud in 1937, as held by the Court below (App. 53), it follows that the present complaint, filed September 28, 1948, was long since barred at that time.

C. The Present Suit Is Likewise Barred by the Doctrine of Res Judicata:

This was the principal basis of the Trial Court's decision. (App. 43A-46A).

The essence of the original complaint is evidently the so-called bribery of Judge Manton. When petitioner discovered it in 1937 (Op. below, App. 53; App. 13A) or thought she did, she had the option of either (a) attempting to set aside the District Court judgment for fraud in the appeal; or (b) filing a suit for damages for fraud. She chose the first course and lost and is now barred, on elementary principles of *res judicata*, from attempting the second. The doctrine of *res judicata* cannot be circumvented by a mere change in the form of the suit;[1] once the grievance is heard by a Court it disappears as a cause of action. (*Diamond* v. *Berman*, 95 F. Supp. 73, 74, distinguishing *Griffith* v. *Bank of New York*, 147 F. (2) 899; 30 *Am. Jur.*, p. 920). Hence the decisions of the C.C.A. (2nd Circuit) are binding as *res judicata*.

The two decisions by the C.C.A. are based partly on laches and partly on the unsatisfactory nature of appellant's so-called "evidence." In the first decision dated May 13, 1942, the Court said "Motion denied. The delay in making this motion is not adequately explained." (App. 43A). In the second, November 14, 1945, the same Court said "Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling." (App. 43A).

Petitioner states in her Brief below, p. 14:

> "It is submitted that if the court to which the motion was addressed did not proceed to adjudicate the validity of the charge made on the motion by hearing witnesses and proof, the denial of the motion should not preclude resort to a later independent proceeding for relief."

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[1] The present is a mere switch from equity to law, a device repudiated in *Toucey* v. *N.Y. Life Ins. Co.*, 102 F. (2) 16, 20; cf. same case 314 U.S. 118, 127 and after remand 112 F. (2) 927, 928.

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This is simply the layman's notion that a court cannot decide a case without hearing witnesses. If followed it would read laches out of the law as a defense. The point is that the C.C.A. held it could never get to the merits *because of laches*, i.e., that a defense of law *prevented* the court hearing the case. Or put another way, the Court held the motion had no merit because of the delay. Appellant's argument is simply a contention that denying relief on the ground of laches is not a decision on the merits. The cases here cited hold the contrary and make laches as good a ground for *res judicata* as any other defense of law.[1]

The doctrine of *res judicata* applies to decisions of an appellate court (*In re Cherokee Co.*, 94 F. (2) 546; 50 *C.J.S. Judgments*, Sec. 607. In *Margardt* v. *Colonial-American Bank*, 78 App. D.C. 348, 140 F. (2) 701, the Court below held that a decision based on laches could be the basis of *res judicata*. (Cf. *Cain* v. *Union Central Life Ins. Co.*, 123 Ky. 59; 93 S.W. 622; *Liken* v. *Shaffer*, 64 F. Supp. 432, 445).

Even if erroneous, the two C.C.A. decisions are *res judicata* as to the present suit. (*U. S.* v. *Moser*, 266 U.S. 236, 242).

The decision of the C.C.A. (2nd Circuit) dated May 13, 1942 not only held the motion was barred by laches but went on to say it had no merit otherwise; that Lasker instead of having millions at stake owned only 33 shares of Paramount's stock out of 3,000,000 and was not even a director at the time. Hence the Court said Lasker's interest in Paramount was too remote to implicate Judge Manton (Plaintiff's Motion to Vacate filed in C.C.A. June 12, 1945, p. 2, Tr. 609). Petitioner now says the C.C.A. was wrong, that Lasker owned more

[1] After holding laches the C.C.A. each time went on to say the motion had no merit otherwise (App. 43A).

stock than Paramount said he did and that she only discovered this after the C.C.A.'s 1942 decision which she says was induced by Paramount's "wrongfully presenting incomplete evidence to that Court." (App. 17A). But this, too, was passed on by the C.C.A. in its May 14, 1945 decision which held the "newly discovered" evidence did not warrant relief. (App. 43A). The vice of petitioner's argument for a present rehearing of this issue is, from a legal viewpoint, that *res judicata* applies not merely to what was *in fact* presented to the C.C.A. in 1942 and 1945 but what *could* have been presented. (*Nalle* v. *Oyster*, 36 App. D.C. 36, 41, Affd. 230 U.S. 165; *Great Atlantic & Pacific Tea Co.* v. *West*, 56 App. D.C. 103, 104; *Beloit* v. *Morgan*, 7 Wall. 619; *Cromwell* v. *Sac County*, 94 U.S. 351). Petitioner's alleged exception as to fraud (*Commissioner* v. *Sunnen*, 333 U.S. 591, 598) is no aid to petitioner because the issue of fraud itself has already been passed upon by the C.C.A., i.e., in its decision of November 14, 1945 the Court said "Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling" (Op. 43A). In other words, the C.C.A. considered the alleged fraud, both old and newly discovered, and held that on the showing made the charge had no merit. No more is before this Court than was before the Circuit Court of Appeals for the Second Circuit in 1945; the Complaint will be searched in vain for any proffer of evidence discovered since 1945. (See Compl. App. 14A-17A). All petitioner has done is to cast her grievance in a new form, "a new and independent action for damages", as she calls it, going on and on in her interminable struggle with prior Court rulings on the precise matter she asserts anew. No clearer need for the doctrine of *res judicata* can be found.

Added to everything else is the sound holding of the Trial Court that even if the affidavits as to Lasker's interest filed in 1942 and 1945 were erroneous and frau-

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dulent, still the so-called fraud was intrinsic, as to which the law affords no relief whatever in a new suit or otherwise. (Opinion of Trial Court, App. 44A; see also *U. S.* v *Throckmorton,* 98 U.S. 61; *Pico* v. *Cohn,* 25 P. 970; *Restatement on Judgments,* Sec. 126(2)(b)).

D. There Is No Conflict of Decision:

The Court below drew a distinction between the alleged bribery of Judge Manton in May 1932 and the alleged false affidavits filed in the C.C.A. in 1942 and 1945 (App. 54-56). It held the latter was a new and distinct claim and hence did not relate back under Rule 15(c) so as to avoid the Statute of Limitations. It seems clear the Court was right; the first claim was complete in 1932 and the second did not arise until ten years or more later. The alleged conflict of decision arises out of petitioner's claim that *L. E. Whitham Construction Co.* v. *Reiner,* 105 F. (2) 371 (C.A. 10th), cited with six other cases by the Court below, is in conflict with *Partin* v. *Wade,* 172 F. (2) 50 (C.A. 8th). There is no conflict; the latter case turned on a provision of Arkansas law that in the event of a nonsuit a new action could be started within a year. It is a mere play on words to say the new suit on the old claim "related back." The Court of Appeals in *Partin* squarely held it did not present a new or different cause of action. This however is the precise question here and hence *Partin* is not in point. In addition both the *Whitham* & *Partin* cases decided what was or was not a separate and distinct cause of action under state law which governed and hence neither is in any real sense a construction of FRCP 15(c).

Even if there were a conflict it would relate to the peculiar circumstances of the present case and would resemble *U. S.* v. *Coplon,* 342 U.S. 920 and *Coplon* v. *U. S.,* 342 U.S. 926, wherein certiorari was denied. Also there are so many other grounds on which the decision below

can be supported that this Court could never reach the alleged conflict (Cf. *NLRB* v. *Sanson Hosiery Mills,* 195 F. (2) 350, cert. denied 344 U.S. 863; *The Arlington* v. *Meyer,* certiorari denied 339 U.S. 965. The case, therefore, has no certiorari appeal under any circumstances.

CONCLUSION

The late Senator Borah once referred to a certain bill as having been "washed up on the shores of debate like some vast prehistoric animal washed up on the shores of the Potomac; too dead to be sent to the zoo, too alive to be sent to the Smithsonian." The present case is similarly situated and we hope this Court will, at last, lay its bones at rest.

Respectfully submitted,

William E. Leahy
Wm. J. Hughes, Jr.
Bowen Bldg.
Washington, D. C.
Attorneys for Respondent

Louis Phillips
New York City
Of Counsel

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